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Religious Persecutions Under Guise of Law

NOTES AND COMMENTS

CIVIL LIBERTIES

RELIGIOUS PERSECUTIONS UNDER GUISE OF LAW

Members of Jehovah's Witnesses were indicted and convicted for conspiracy to incite the people against all forms of organized government and to disrespect the flag of the United States. They appealed. *Held*, reversed, the defendants did not violate either of the conspiracy laws under which conviction was attempted.[1]

The conviction in the lower court is but another example in the long and alarming series of 'persecutions" brought under existing criminal and regulatory statutes and local ordinances against Jehovah's Witnesses and other small religious sects.[2]

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[1] McKee v. State, —— Ind. ——, 37 N.E. (2d) 940 (1941). IND. STAT. ANN. (Burns, 1933) §10-1101. This general conspiracy statute requires that the conspiracy be for commission of a felony. But the disrespect of the flag charged in the indictment and conviction is only a misdemeanor. (See IND. STAT. ANN. (Burns, 1933) §10-506.

The charge of conspiracy to incite the people against all forms of organized government is a felony. IND. STAT. ANN. (Burns, 1933) §10-1302. But the court properly found that the evidence failed to show danger of "force or violence" toward the government or any advocacy of "physical injury" to property. Thus, the statute making conspiracy to commit a felony and the riotous conspiracy statute which requires disguise, were inapplicable. See IND. STAT. ANN. (Burns, 1933) §10-1506.

[2] Jehovah's Witnesses believe that no person should salute the flag of any nation nor pledge allegiance to any country. Moreover, their religion does not permit them to go to war. *Ex parte* Winnett, —— Okla. App. ——, 121 P. (2d) 312, 314 (1942); see (1941) 10 INT. JUR. ASS'N MON. BULL. 1, 5 *et seq.*

Ordinances regulating the distribution of handbills have been most frequently used to attack the sect. Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. Town of Irvington, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938); Borchert v. City of Ranger, 42 F Supp. 577 (N.D. Texas 1941); Reid v. Borough of Brookville, 39 F Supp. 30 (W.D.Pa. 1941); Kennedy v. City of Moscow, 39 F Supp. 26 (D. Idaho, 1941); Buxbom v. City of Riverside, 29 F. Supp. 3 (S.D. Calif. 1939); Manchester v. Leiby, 117 F. (2d) 661 (C.C.A. 1st, 1941); Commonwealth v. Pascone, 308 Mass. 591, 33 N.E. (2d) 522 (1941); *Ex parte* Winnett, —— Okla. App. ——, 121, P (2d) 312 (1942); *Ex parte* Walrod, —— Okla., ——, 120 P. (2d) 783 (1941).

Some ordinances have even required a salute to the flag as a condition precedent to obtaining a license to distribute literature. Kennedy v. City of Moscow, *supra* (ordinances of four cities); Reid v. Borough of Brookville, *supra.*

Other prosecutions have been brought charging trespass. Convictions were affirmed in Buxbom v. City of Riverside, *supra;* State v. Martin, 99 La. 39, 5 So. (2d) 377 (1941), Comm. v. Palmo, 141 Pa. Super. 430, 15 A. (2d) 481 (1940). Convictions were reversed in Donley v. City of Colorado Springs, 40 F. Supp. 15 (D. Colo. 1941); Zimmerman v. Village of London, 38 F. Supp. 582 (S.D. Ohio 1941); Tucker v. Randall, 18 N.J. Misc. 675, 15 A. (2d) 324 (1940). *Parading without a license*: Convictions affirmed in State v. Cox, 91 N.H. 137, 16 A. (2d) 508 (1940); Commonwealth v. Hesler, 141 Pa. Super. 421, 15 A. (2d) 486 (1940). Conviction reversed in People v. Kieran, 26 N.Y. Supp. (2d) 291 (County Ct. 1940). *Selling Merchandise without a license*: Conviction up-

While state constitutions contain varying guarantees of religious freedom,[3] the interpretation of these provisions is no longer of paramount importance. The Supreme Court of the United States has extended the guarantee of religious freedom from federal interference provided in the First Amendment[4] to similar protection from state interference. This has been achieved by reading the First Amendment into the "due process" clause of the Fourteenth Amendment.[5]

The right of religious freedom established under the First and Fourteenth Amendments is not absolute. Organized government has the power to over-ride religious freedom whenever it is necessary to protect itself from destruction, either by internal or external forces.[6] Likewise, it may limit religious freedom in the exercise of the police power for the protection of the health, safety and morals of the community.[7]

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held in Commonwealth v. Pascone, *supra*. (D was distributing booklets for 25¢ to those who felt like paying, free to others who would take them to read) *Disorderly conduct or breach of the peace*· Convictions reversed in Cantwell v. Connecticut, *supra*, People v. Ludovici, 13 N.Y. Supp. (2d) 88 (County Ct. 1939); City of Gaffney v. Putnam, 197 S.C. 237, 15 S.E. (2d) 130 (1941) (Appeal in assault and battery case of person attacked while distributing handbills wherein the prosecuting witness admitted and testified he was the aggressor, and there was no claim that defendant had used more than reasonable force).

[3] IND. CONST. ART. I, §2. "Right to Worship. All men shall be secured in their natural right to worship Almighty God, according to the dictates of their conscience." See Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States* (1930) 39 YALE L.J. 659. This article develops the thesis that religious beliefs of the dominant Christians are allowed, in effect to control everyday affairs through laws which are actually enforced, or if not enforced, are still dangerous to civil rights of citizens because enforceable at will.

[4] U.S. CONST. AMEND. I "Religious and Political Freedom. Congress shall make no law respecting an establishment of religions, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[5] U.S. CONST. AMEND. XIV, §2; Minersville School District v. Gobitis, 310 U.S. 586, 593 (1940); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in that amendment [14th] embraces the liberties guaranteed by the First Amendment."); Schneider v. Town of Irvington, 308 U.S. 147, 160 (1939), Hague v. C.I.O., 307 U.S. 496, 512 (1939); Lovell v. City of Griffin, 303 U.S. 444, 456 (1938); De Jonge v. Oregon, 299 U.S. 353 1937), Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931), Whitney v. California, 275 U.S. 357 (1927). *Contra*: Prudential Ins. Co. v. Cheek, 259 U.S. 530, 539 (1922) (reviewing authorities); Slaughter House Cases, 16 Wall. 36, 72 (U.S. 1872).

[6] Hamilton v. Regents, 293 U.S. 245 (1934) (conscientious objectors); United States v. MacIntosh, 283 U.S., 605, 623 (1931); Arver v. United States, 245 U.S. 366 (1917) (Selective Service cases).

[7] Suppression of religious practices dangerous to morals, Mormon Church v. United States, 136 U.S. 1 (1889), Davis v. Beason, 133

Where, as in the instant case,[8] a state or federal statute falls within either of these two clear and unmistakably acceptable limitations noted above, the function of the court in protecting religious liberty is to check and rebuke over-zealous local officials[9] who have sought to cloak religious persecution in respectable clothing in order to crush the religious minorities of whose doctrines the majority of the community do not approve.[10]

The greatest peril to religious freedom lies in this area, for such cases are rarely appealed. The number of abuses and infringements of religious liberty is much greater here than in the more spectacular cases where the validity of the laws under which convictions are made is in issue.[11] The job of appellate courts is to protect minorities from such ill-founded prosecutions by applying the statutes objectively, ignoring the religious faiths of the defendants. The Supreme Court of Indiana did this job well in the instant case.

U.S. 333 (1889), Reynolds v. United States, 98 U.S. 145 (1878). Regulation of use of sacramental wines, Shapiro v. Lyle, 30 F (2d) 971 (W.D. Wash. 1929). Denial of use of radio facilities, Trinity Methodist Church v. Fed. Radio Comm., 62 F. (2d) 850 (App. D.C. 1932);

While not limitations on religious freedom, the constitutional provisions have been held inapplicable in the following cases: Bradfield v. Roberts, 175 U.S. 291 (1899) (gift to hospital religiously sponsored), Quick Bear v. Leupp, 210 U.S. 50 (1907); Bradfield v. Roberts, *supra*, (government contracts with religious institutions).

[8] Since it was unnecessary for a determination of the case, the court did not rule on the validity of the statutes involved, but it is a fair inference from the language used by the court in interpreting IND. STAT. ANN. (Burns, 1933) §§ 10-1302 that they regarded them as constitutional. McKee v. State, —— Ind. ——, 37 N.E. (2d) 940, 942 (1942).

[9] Cases which have been appealed represent only a small proportion of the total, the bulk of prosecutions occur in justice of the peace, magistrate and police courts.

[10] "The most that was done in the night-time was to unite to distribute literature that was *objectionable to many persons in the community* (italics ours) and to discuss the doctrines contained in the literature." McKee v. State, —— Ind. ——, 37 N.E. (2d) 340, 342, (1942).

Such cases as Minersville School District v. Gobitis, 310 U.S. 586 (1940), *supra* note 5, encourage "persecutions" by overzealous local officials. Since that decision several prosecutions charging contribution to the delinquency of a minor have been brought against parents for teaching children not to salute. Conviction upheld in State v. Davis, —— Ariz. ——, 120 P (2d) 808 (1942). Conviction reversed in State v. Lefebvre, —— N.H. ——, 20 A. (2d) 185 (1941); *In re* Jones, 175 N.Y. Misc. 451, 24 N.Y. S. (2d) 10 (Children's Ct. 1940).

[11] However, in the penumbra between permissible and non-permissible limitations lie the cases which today present the most challenging questions of policy. For one of the most widely debated cases, see Minersville School District v. Gobitis, 310 U.S. 586 (1940), cited in notes 5 and 10, *supra*. Others are Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State of New Jersey, 308 U.S. 147 1939). *Cf.* Schenck v. United States, 249 U.S. 47 (1919); Whitney v. California, 274 U.S. 357 (1929).